

REMARKS

Claims 1-12, 14-43, 45-61 and 63-65 are pending in the application.

Claims 1-10, 14-41, 45-61 and 63-65 have been rejected.

Claims 2, 3, 11, 16, 31, 34, 35, 42, 60, 63 and 64 have been objected to.

Claims 2, 3, 11, 16, 31, 34, 35, 42, 60, 63 and 64 have been amended, as set forth herein.

I. **ALLOWABLE SUBJECT MATTER**

The Applicant thanks the Examiner for the indication that Claims 11-12 and 42-43 would be allowable if rewritten in independent form. Because the Applicant believes that Claims 11-12 and 42-43 depend from allowable base claims, the Applicant prefers not to rewrite Claims 11-12 and 42-43 in independent form, at this time.

II. **CLAIM OBJECTIONS**

Claims 2, 3, 11, 16, 31, 34, 35, 42, 60, 63 and 64 were objected to because of informalities. Claims 2, 3, 11, 16, 31, 34, 35, 42, 60, 63 and 64 have been amended to correct the informalities identified in the Office Action. Accordingly, the Applicant respectfully requests the Examiner withdraw the objections to these claims.

III. REJECTION UNDER 35 U.S.C. 102

Claims 1-7, 14-17, 19-38, 45-46, 48-61 and 63-65 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,515,964 B1 to Cheung, et al. (hereinafter “Cheung”)¹. The rejection is respectfully traversed.

A cited prior art reference anticipates the claimed invention under 35 U.S.C. § 102 only if every element of a claimed invention is identically shown in that single reference, arranged as they are in the claims. MPEP § 2131; *In re Bond*, 910 F.2d 831, 832, 15 U.S.P.Q.2d 1566, 1567 (Fed. Cir. 1990). Anticipation is only shown where each and every limitation of the claimed invention is found in a single cited prior art reference. MPEP § 2131; *In re Donohue*, 766 F.2d 531, 534, 226 U.S.P.Q. 619, 621 (Fed. Cir. 1985).

Independent Claims 1, 32, 61 and 63 recite method, apparatus and article in which a throughput measurement request is transmitted that causes a trace to propagate via a path between the origination terminal and the destination terminal. In response to the trace, information is received that identifies one or more network resources on the path between the origination terminal and the destination terminal. Performance characteristics of the identified one or more network resources is monitored to generate a throughput measurement of the path. Cheung fails to disclose these elements/features of Applicant’s independent claims.

¹ Applicant notes that this rejection refers to Claims 1-10, 14-41, 45-61 and 63-65; however, Applicant believes that the Office Action intended for only Claims 1-7, 14-17, 19-38, 45-46, 48-61 and 63-65 to be identified and so rejected.

Cheung describes an admission control gateway to an IP network that may receive a voice or data call from another network. See Cheung, Col. 5, Lines 44-65. Call quality requirements for the call may be predetermined or may be retrieved from a lookup table. See Cheung, Col. 6, Line 64, through Col. 7, Line 3. The gateway accumulates network performance parameters by polling every other gateway in the network or by receiving data from network components, such as routers. See Cheung, Col. 5, Line 65, through Col. 6, Line 4. The network performance parameters may be accumulated by a gateway, so as to be up-to-date data, or the gateway may access a quality of service computer to obtain the parameters. See Cheung, Col. 7, Lines 34-39. The network performance parameters characterize the incoming and outgoing gateways and the performance of the remainder of network as a whole. See Cheung, Col. 7, Lines 14-33.

The Office Action concludes, without citation to the reference, that the gateway of Cheung immediately implements a polling for network performance parameters upon receipt of a call. The Applicant respectfully submits that such conclusion is unsupported by the disclosure in Cheung, which describes a gateway maintaining up-to-date data by polling other gateways; that is, a system in which polling is ongoing and regular, rather than performed in response to the receipt of a call.

The Applicant requests that the Examiner provide citation to passages in Cheung that provide a disclosure of the alleged immediate polling in response to receipt of a call, as required to support a rejection under § 102, particularly since such could not be identified upon the undersigned's review of the reference..

Applicant notes that the previous Office Action stated “Cheung does not disclose transmitting a throughput measurement request, the throughput measurement request causing a trade packet to propagate between the origination terminal and the destination terminal and receiving a throughput measurement response in response to the transmitting of the throughput measurement request.” See Office Action mailed June 30, 2004, Page 3, second paragraph. In agreement with this previous position on the teaching of Cheung, the Applicant respectfully maintains that Cheung describes aggregate network performance parameters received from all other gateways in the network, or from a quality of service computer that maintains such parameters for the network as a whole. Cheung describes neither causing a trace to propagate via a path between origination and destination terminals, nor receiving information in response to that trace that identifies network resources on that same path, as recited in independent Claims 1, 32, 61 and 63.

As such, Chen fails to disclose every element/feature of Applicant’s invention arranged as they are in independent Claims 1, 32, 61 and 63 (and Claims 2-7, 14-17, 19-31, 33-38, 45-46, 48-60, 64 and 65 depending therefrom). Accordingly, the Applicant respectfully requests the Examiner withdraw the § 102(e) rejection of Claims 1-7, 14-17, 19-38, 45-46, 48-61 and 63-65.

IV. REJECTION UNDER 35 U.S.C. 103

Claims 8-10 and 39-41 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Cheung. Claims 18 and 47 were rejected under 35 U.S.C. § 103(a) as being unpatentable over

Cheung in view of U.S. Patent No. 6,356,545 to Vargo et al (hereinafter "Vargo"). These rejections are respectfully traversed.

Claims 8-10 and 18 depend from independent Claim 1, and Claims 39-41 and 47 depend from independent Claim 32, and incorporate the features/elements recited in their respective base claims. Thus, for the same reasons given above with respect to the §102 rejection of independent Claims 1 and 32, the Cheung and Vargo references, either alone or in combination, do not disclose, teach or suggest all the features/elements of Claims 8-10, 18, 39-41 and 47 and, therefore, a prima facie case of obviousness has not been established. Vargo fails to cure the noted deficiencies of Cheung.

Accordingly, the Applicant respectfully requests withdrawal of the § 103 rejections of Claims 8-10, 18, 39-41 and 47.

V. CONCLUSION

As a result of the foregoing, the Applicant asserts that the remaining Claims in the Application are in condition for allowance, and respectfully requests an early allowance of such Claims.

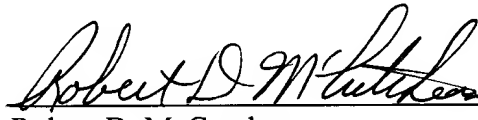
If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at *rmccutcheon@davismunck.com*.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Davis Munck Deposit Account No. 50-0208.

Respectfully submitted,

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